

## **REAL ESTATE AS CONTRIBUTION TO A COMPANY**

The Code of Commercial Companies (KSH)<sup>1</sup>, similar to the Commercial Code<sup>2</sup> which was in force before, does not define a term of contribution to a commercial company directly. The Code only stipulates that in case of a private company (general partnership, ordinary partnership, limited partnership and limited–joint stock partnership) partner’s contribution may involve a transfer or burden/encumbrance of the possession of things or other rights as well as provision of other considerations for the company. Whereas in case of capital partnerships (limited liability company and joint stock company) KSH does not define the term of contribution to a commercial company directly, and only in Art. 14 § 1 it provides that such right cannot be an object of non–pecuniary contribution.

These cannot be non–transferable rights nor provision of work/labor or services. Thus we deal with a statutory attempt to define a contribution to a capital company by indicating what the object thereof cannot be. A construction of Art. 14 § 1 of KSH provides a basis for formulating a thesis according to which this provision refers to the criteria of the object of contribution worked out by the jurisdiction only to a specific extent<sup>3</sup>. Analyzing the output of the jurisdiction it should be emphasized that the Supreme Court held an opinion that the object of contribution to a company may only be financial rights representing economic value which are transferable and which may take positions of assets in the company’s balance<sup>4</sup>. The subject literature absolutely/decisively underlines features/properties contributions made to a company should be characterized with<sup>5</sup>. They include: admissibility of a certain right to legal transactions, a possibility to establish the economic value of this right as the object of contribution, a possibility of placing/including this right in the company’s

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1 Act of 15.09.2000 – Code of Commercial Companies (Journal of Laws No. 94, par. 1037 with subsequent changes), hereinafter as KSH.

2 Decree of President of the Republic of Poland of 27.06.1934 – Commercial Code (Journal of Laws No. 57, par. 502 with subsequent changes), hereinafter as KH.

3 T. Mróz, *Funkcje kapitału zakładowego, a przedmiot wkładu w spółkach kapitałowych, ze szczególnym uwzględnieniem aportu*, Studia z prawa prywatnego gospodarczego. Księga pamiątkowa ku czci prof. Ireneusza Weissa, Kraków 2003, p. 188.

4 See, e.g., reasons to the resolution of the Supreme Court of 26.03.1993 (III CZP 21/93), verdict of the Supreme Court of 20.05.1992 (III CZP 52/92).

5 P. Włodyka (edit.), *Prawo Spółek*, Kraków 1996, p. 480.

balance, transferability of the right which is the object of contribution to a company and functional/operational equivalency (interchangeability, exchangeability) in proportion to pecuniary contribution<sup>6</sup>.

In the commercial law doctrine the term “contribution” is understood as the object of partner’s or shareholder’s consideration specified in the company’s partnership contract (contract) contributed in return for interests and shares taken in possession therein<sup>7</sup>. It results from Art. 3 of KSH that a description of the object of contribution and determination of its value belong to *essentialia negotii* of a commercial company’s partnership contract, and concluding a partnership contract, partners are obligated to contribute shares.

As a rule KSH envisages two kinds of contribution – pecuniary and non-pecuniary. Each kind of contribution should be assigned into a company at the time of its formation. In case of private companies a partner is obliged to contribute share to the company which is to be set up only at the moment the company is registered in the entrepreneurs’ register–KRS<sup>8</sup>. Whereas in case of capital companies the object of contribution is assigned into the company under organization. A company under organization is a capital company which is operating between the moment of concluding a partnership contract and the moment of the company’s registration in the entrepreneurs’ register–KRS, i.e. a factual moment of the company’s establishment. From the moment of effecting an entry into the entrepreneurs’ register–KRS, a capital company is set up as a fully organized entity and obtains legal status.

Contributing share into a commercial company may involve transfer or encumbrance of the possession in things or other rights as well as provision of other considerations to the company. In particular, the object of non-pecuniary contribution may be: the ownership right, substantive/financial rights other than ownership rights, contract/liability rights and, in case of private companies, provision of work/labor and services. By all means the most important amongst the above listed rights are ownership rights, including: enterprise/business ownership, ownership of organized parts of an enterprise/business, ownership of movables and real estate ownership<sup>9</sup>.

With regard to ownership of movables and real estates, we should emphasize the meaning of Art. 46 of the Civil Code (KC)<sup>10</sup>. Pursuant to its content, a real estate is part of the earth’s surface which constitutes a separate object of ownership (land) as well buildings permanently attached to the land, or parts thereof, if by special provisions they are an object of ownership separate from the land. The provision

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6 P. Soltysiński, A. Szajkowski, A. Szumański, J. Szwaja, Kodeks handlowy. Komentarz t. I, Warsaw 1996, p. 159.

7 P. Soltysiński, A. Szajkowski, A. Szumański, J. Szwaja, op. cit., p. 33.

8 Act of 20.08.1997 on State Court Register (Journal of Laws of 2001 No. 17, par. 209 with subsequent changes), hereinafter as KrRejU.

9 A. Kidyba, Prawo spółek handlowych, Kraków 2005, p. 101.

10 Act of 24.04.1965 – Civil Code (Journal of Laws No. 16, par. 93 with subsequent changes), hereinafter as KC.

of Art. 235 of the Civil Code includes a special regulation, under which buildings erected on the land owned by the State Treasury or by units of local self-government by the perpetual usufructuary are his property and a building on real estate separated from the land. Whereas land ownership extends into the space over and under the land within limits determined by its social-economic designation<sup>11</sup>. Except fossils found at different depths in the land and regulated by separate legal provisions, whatever refers to the land of real estate as a subject of civil law relationship also comprises an air column localized over the land and the land itself around its contour/outline. Following tradition, the Civil Code does not define the term of a movable at all, thus using a negative definition – movables are all things which are not immovables/real estates. A suitable application of the Civil Code's provisions with regard to commercial companies defines precisely, clearly and without any doubt a possibility of making use of a definition of a real estate expressed in the Civil Code's provisions<sup>12</sup>.

KSH's provisions as well as suitably applied KC's provisions granting private companies a legal status, as well as KSH's provisions granting capital companies legal status, stipulate directly a possibility of purchasing real estates by commercial companies as the company's assets. These assets may also be contributed to the company by partners in a form of a contribution/share. Such a clear regulation aims at eliminating any and all doubts as to the possibility of purchasing real estates by the companies. What is more, there are no doubts whatsoever as to purchasing the ownership right to the real estate as contribution/share contributed by partners to the company under organization. In the light of Art. 12 of KSH, it is obvious that a company under organization becomes subject to the rights to the real estate purchased by the company during its organization as well. The concept assuming legal status of a capital company under organization in the scope of purchasing a real estate was criticized by doctrine representatives as early as on the stage of draft works on KSH. In J. Frąckowiak's opinion, KSH's provisions should decisively/absolutely exclude a possibility of purchasing a real estate by a company under organization (also as a form of contribution/share contributed by partners) because separate regulations could threaten safety and certainty of economic turnover/transactions as well as the rule of civil law, according to which you should not allow the ownership to be assigned into another person if this right is not of a final nature<sup>13</sup>. However, these postulates of commercial law doctrine have not been included in the KSH's draft/project.

A disposal/administration of the real estate ownership is treated by the law as an action of fundamental importance to the owner's financial interests due to the

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11 M. Safjan (edit.), System Prawa Cywilnego, Prawo cywilne–część ogólna, Warsaw 2007, p. 1180.

12 Art. 2 KSH.

13 J. Frąckowiak, Uwagi do projektu prawa spółek, "Przegląd Prawa Handlowego" 1999, No. 2, p. 14.

value of this object in turnover/transactions<sup>14</sup>. Therefore, legal regulations condition admissibility of such administration on special requirements. These requirements will regard the content of a legal act transferring the real estate ownership into a company as well as requirements concerning a form of the ownership right's assignment. The first ones include a categorical/unconditional order resulting from KHS's provisions imposing a detailed specification of the object of contribution included in a partnership contract, whereas the other ones include an obligation to carry out a legal act transferring the real estate ownership by a notary deed. In other words, a partner transferring the real estate ownership into a company must expressly declare in the partnership contract that he/she contributes to the company the real estate ownership as a partner's contribution/share and not some other right (e.g. limited property right). Effective assignment/transfer of the real estate ownership into a company requires a notary deed of the act administering/disposing the real estate ownership right under penalty of being null and void. That's why a commercial company contract, which according to KSH's provisions must be in writing to be valid, must be concluded in this case in a form of a notary deed.

The rule saying that apports (pecuniary contributions) may only be assets which can be placed/contained in the company's balance decides about a fundamental importance of non-pecuniary contribution's estimation that is to be contributed to a company<sup>15</sup>. The estimation of the object of contribution, including the real estate ownership, is made by partners. Only in case of a joint stock company KSH's provisions obligate the Managing Board of a newly created joint stock company to commission the evaluation of reliability of the contributions' estimate made by shareholders to an expert auditor. In case of the estimate report on the value of a real estate contributed as share to a commercial company an appropriate and reliable establishment of the value of a real estate contributed as share is extremely important. An estimate report of a real estate contributed to a company must be based on a reliable assessment of its economic value including all factors, both factual and legal, which could affect the value of a real estate contributed as share.

Apart from commercial companies, civil law companies function/operate in economic turnover/transactions. Pursuant to Art. 861 § 1 of KC, partner's contribution /share to a civil law company may involve contribution of ownership or other rights or provision of services to a company<sup>16</sup>. Discussing the issue of contributions it seems necessary to remind of the fact that a civil law company is not a legal person. It is only a liability relationship joining partners who are entrepreneurs. If a partnership contract does not create the establishment of a separate legal person, the property created from contributed shares will not be civil law company's property treated as

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14 M. Minas, *Aport w spółce kapitałowej*, Gdańsk 2005, p. 125.

15 M. Minas, *op. cit.*, p. 91.

16 M. Kutyla, *Nieruchomość jako wkład do spółki cywilnej*, "Nieruchomości" 2000, No. 1, p. 15.

a separate legal subject but joint property of partners, which, however, constitutes some separated whole. Therefore, an expression used in Art. 861 § 1 of KC should be understood in the following way: ownership rights or other rights contributed as share will become a separated joint property of the partners. In case of contributing to a company ownership of things, we should take into account provisions of Art. 862 of KC, according to which relevant provisions on sale are applied in execution/performance of an obligation involving contribution to a company of the possession in things as well liability for warranty and jeopardy of losing or damaging things. It should be emphasized that contribution of the possession in things to a company, however, is not a sale of things. It results from the quoted provision that, first of all, in order to execute/perform the above mentioned obligation, only the provisions on sale stipulated therein can be applied, second, application of these provisions is admissible only respectively/appropriately. It is also undeniable that if a partner is obliged to contribute the possession in things to a company, including real estates, KC's provisions on ownership transfer should be applied directly. A partner contributing a real estate ownership to a company ceases to be its only owner and all partners become its co-owners. Undoubtedly, we deal here with a transfer of real estate ownership. Therefore, in case of contributing real estate ownership to a company, it is necessary to observe the requirement of a notary deed provided for in Art. 158 of KC. On the other hand, Art. 860 § 2 of the Civil Code stipulates that a written form is only sufficient to prove a conclusion of a civil law company contract. Therefore, if a civil law company contract, where a partner is obliged to contribute real estate ownership as his share to a company has been concluded in accordance with the above mentioned general rule, it is necessary to conclude an additional contract by a notary deed in order to transfer real estate ownership. It is different when a civil law company contract is concluded by a notary deed. If such a contract stipulates the contribution in a form of real estate ownership, it should be deemed in the meaning of Art. 155 § 1 of KC as a contract obliging ownership transfer, which, according to the rule of a double effect of liability contracts, evokes not only a disposing/administering effect but at the same time it transfers ownership into a purchaser.

Elements/items of property contributed to a company as share constitute company's property and are part of its assets. Fixed assets and intangible and legal values of an expected period of use, not longer than a year, which are used for the needs connected with economic activity carried out by the company, are subject to depreciation if they are complete and fit to use on the day they are received to use<sup>17</sup>. Therefore, elements/items of property contributed as share in a form of so called

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17 Act of 26.07.1991 – on Income Tax from Physical Persons (Journal of Laws of 2000 No. 14, par. 176 with subsequent changes), hereinafter as PDOFizU. Act of 15.02.1992 – on Income Tax from Legal Persons (Journal of Laws of 2000 No. 54, par. 654 with subsequent changes), hereinafter as PDOPrU.

fixed assets under construction (e.g. building on real estates under construction) are not registered as fixed assets and thus they are not depreciated. Amongst the others, capital allowance cannot be made on lands and perpetual usufruct of lands or buildings and residential houses if a tax payer does not make a decision on depreciating shares contributed to a company – Art. 22c PDOFizU.

Partnership contract's conclusion generates tax effects. Partnership contract is concluded when a tax liability in the scope of tax on civil law actions arises<sup>18</sup>. Partners are jointly obliged to register the conclusion of a partnership contract and to pay due tax. A tax base will be a sum of value of shares contributed to the company or the amount of its initial capital.

Summing up, it should be stated that real estates, or rather real estate ownership right contributed to a company as share, is becoming more and more popular way of carrying out shares to companies or to initial capital. Incessantly increasing value of real estates makes it a very attractive contribution which, on the one hand, may guarantee a partner a large share in the property/assets (in initial capital) of a company, and on the other hand, may be an object of considerable value in the assets/property of the company itself. That is why it is extremely important to determine the object of contribution which is real estate precisely, to establish the contribution's apportion capacity, its effective contribution to a company, as well as to satisfy tax and accounting obligations which will burden both partners and the company itself.

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18 Act of 9.09.2000 – on Tax on Civil Law Actions (Journal of Laws of 2005, No. 41, par. 399 with subsequent changes), hereinafter as PccU.

## Streszczenie

W doktrynie prawa handlowego pod pojęciem „wkładu” rozumie się określony w akcie założycielskim (umowie) spółki przedmiot świadczenia wspólnika lub akcjonariusza wnoszony w zamian za obejmowane udziały lub akcje. Z art. 3 KSH wynika, że opis przedmiotu wkładu i określenie jego wartości należą do essentialia negotii umowy spółki handlowej, a wspólnicy poprzez zawarcie umowy spółki zobowiązują się do wniesienia wkładów. KSH przewiduje co do zasady dwa rodzaje wkładów – są to wkład o charakterze pieniężnym oraz wkłady niepieniężne. Wniesienie wkładu do spółki handlowej może polegać na przeniesieniu lub obciążeniu własności rzeczy lub innych praw, a także dokonaniu innych świadczeń na rzecz spółki. W szczególności przedmiotem wkładu niepieniężnego mogą być: prawo własności, inne niż prawo własności prawa rzeczowe, prawa obligacyjne oraz w przypadku spółek osobowych świadczenie pracy i usług. Najważniejszą grupą spośród wymienionych są niewątpliwie prawa własności w tym: własność przedsiębiorstwa, własność zorganizowanych części przedsiębiorstwa, własność rzeczy ruchomych oraz własność nieruchomości.